SUPREME COURT OF KENTUCKY
2018-SC-000111-D

RICHARD A. GETTY,
SESAMIE BRADSHAW and
ERROL COOPER — APPELLANTS

v.

APPELLANTS' REPLY BRIEF

APPEAL FROM COURT OF APPEALS CONSOLIDATED CASE NOS.
2014-CA-00686, 2014-CA-00693, 2014-CA-00711 and 2014-CA-00764

BOURBON CIRCUIT COURT
HON. ROBERT MCGINNIS, JUDGE
CONSOLIDATED CIVIL ACTION NOS. 09-CI-00476 and 10-CI-00424

BRENDA SUE BRIDGES GETTY,
CAROLYN CARROWAY,
JOE MAYER and KEVAN MORGAN — APPELLEES

Respectfully submitted,

STOLL KEENON OGDEN, PLLC

William M. Lear, Jr.
John W. Bilby
Lucy A. VanMeter
300 West Vine Street, Suite 2100
Lexington, Kentucky 40507
(859) 231-3000 telephone
(859) 253-1093 facsimile
COUNSEL FOR APPELLANTS

CERTIFICATE PURSUANT TO CIVIL RULE 76.12(6)

The undersigned certifies that a true and accurate copy of Appellants' Reply Brief on behalf of Richard A. Getty, Sesamie Bradshaw and Errol Cooper was served upon the following via U.S. Mail postage prepaid this 12 day of October, 2018: Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Leslie P. Vose, Mark L. Moseley, Erin C. Sammons, Gregory A. Jackson, LANDRUM & SHOUSE, 106 West Vine Street, Suite 800, P.O. Box 951, Lexington, KY 40588-0951 as counsel for Appellees and Hon. Robert McGinnis, Special Judge, Bourbon Circuit Court, 310 Main Street, Paris, KY 40361 and 775 Johns Road, Butler, KY 41006. The record on appeal was not withdrawn.

COUNSEL FOR APPELLANTS

Come now Richard A. Getty, Sesamie Bradshaw and Errol Cooper (collectively "Appellants"), by counsel, and pursuant to CR 76.12 and the Court's Order of June 6, 2018 granting Discretionary Review, respectfully submit the following Reply Brief.

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

What is at stake is a jury's right to decide disputes and make determinations regarding material issues of fact. Sue's brief contains page after page of impassioned arguments regarding why this Court should accept her version of the facts. The jury in this case heard her arguments. The jury also heard witness testimony, reviewed 221 exhibits, evaluated the credibility of witnesses, and considered all the evidence in its full context over the course of 2 ½ weeks. In the end, the jury did not believe Sue and found in Appellants' favor on the issues of unsound mind, undue influence and misappropriation. The jury's finding should not be disturbed.

This Court recently issued an opinion holding that the Court of Appeals "exceeded its scope of review" by reversing a trial court's findings of fact after a bench trial. *C.W. Hoskins Heirs v. Wells*, 2018 Ky. LEXIS 291, *32 (Ky. Aug. 16, 2018), attached hereto as Appendix A. This Court held that "the trial court was in the best position to assess the credibility and make findings of fact... It is immaterial that the Court of Appeals' majority would have decided the case differently..." *Id.* at *32-33. Similarly, when a case is submitted to a jury who has seen and heard the parties and witnesses testify, the jury has a "better opportunity to determine the weight to be given their evidence than can the court from a reading of the record. Many things appear in the trial to lend color and weight to the evidence which do not appear in the record." *Martine v. Roadcap*, 136 S.W.2d 16, 21 (Ky. 1940).

In determining whether a trial court should have granted a directed verdict, the Court of Appeals must take as true all evidence that favors the prevailing party, giving every fair and reasonable inference that can be drawn from the evidence, and may set aside the jury's verdict only if "there is a complete absence of proof on a material issue or

if no disputed issues of fact exist upon which reasonable minds could differ." *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998). This was a fact intensive case inappropriate for directed verdict as amply demonstrated by the evidence Appellants detailed in their brief and the fact that Appellees attached ***48 exhibits*** to their brief. The Court of Appeals greatly exceeded the scope of its authority when it usurped the role of the jury.

1. The Trial Court Properly Denied The Motion For Directed Verdict As To Unsound Mind

Sue argues that the Court of Appeals was able to "sift through the hyperbole and smear campaign[1] to identify the actual evidence" and determine that the "evidence established beyond question that Dick intended to disinherit his biological children." Appellees' Brief at 3. Sue's brief then recounts the "evidence" that supports the "conclusion that Dick had sufficient capacity." *Id.* at 21. The fundamental flaw with her approach is that it was not for the Court of Appeals to sift through the evidence and determine whether it supported the conclusion that Dick had capacity. The Court of Appeals was required to ***accept Appellants' evidence as true*** and determine only whether there was a complete absence of evidence which, of course, there was not.

Sue does not address the key pieces of testimony which, if taken as true, are sufficient evidence of unsound mind to reach the jury:

- Dick's own words on videotape establish he did not understand the character and value of his estate, i.e., that he wished to provide a trust for Yolanda and Sesamie but executed documents that left nothing that could be placed in trust for their benefit. *See* Appellants' Brief at 15-16.

- After the 2008 estate plan was executed, Dick told Sesamie that he had provided for her and her daughter, which was the opposite of what he had done, thereby

[1] In truth, it was Sue who engaged in a "smear campaign" against Rich and Yolanda, yet the jury's verdict was reasoned and clearly not based on passion or prejudiced. While Appellants prevailed on the primary issues in the case, the jury rejected the claim for punitive damages against Sue and found in her favor on the wrongful death claim. (RA 10195)

demonstrating that he did not have capacity to understand the documents he signed at Carroway's direction. *Id.* at 16.

- The contemporaneous nursing notes demonstrate Dick could become severely impaired by his narcotic pain medication such that he did not even know the year. *Id.* at 17. Those same notes document that Dick was on the highest narcotic pain medication doses of his life on the very day the estate plan was executed. *Id.* at 18. Dr. Kuhn testified that those dosages would profoundly impair cognitive functioning. *Id.*

- Dick's signatures documented his deteriorating state and his attorney altered a document after it was signed rather than have Dick sign it again, presumably because of a fear that Dick was no longer under the influence of narcotics and would not sign the revised documents if he understood their contents. *Id.* at 19.

Sue does not dispute that it was Dick's nature to speak his mind and she cites two letters to Rich as examples. *See* Appellees' Appendix 3, 4. Given this background, and Carroway's admitted belief that "litigation would ensue" regarding the 2008 estate plan (Appellees' Brief at 14), it is notable that Dick is never asked on the videotape to explain why he had allegedly decided to disinherit his children and grandchildren and leave his entire estate to his wife. It is ironic that Sue argues that "Appellants seek to stifle Dick Getty's voice." If Dick truly intended to disinherit his children and been fully cognizant and able to express himself as Carroway claims, then Dick could have been asked to state his reasons on the videotape. The fact that Dick is completely silent, that the will is not read to him, that the key documents – the deeds – divesting his estate of its primary assets are executed off camera, that Dick made statements during and after the execution indicating he did not understand what he had done, all support the conclusion that Dick lacked capacity to understand the nature of his estate and the effect of the 2008 estate

plan. For these reasons, the trial court properly submitted the question of unsound mind to the jury, and the Court of Appeals' Opinion should be reversed.[2]

2. The Trial Court Properly Denied The Motion For Directed Verdict As To Undue Influence

The jury ***unanimously*** determined that Dick acted under the undue influence of Sue when he executed his 2008 estate plan. Appellants' Brief set out the evidence showing that Sue unduly influenced Dick by, among other things, using the Guardianship Proceeding as a means to cause Dick to believe that Rich was trying to place him in a nursing home including the testimony of Bill Bishop (that Dick didn't know who to believe), Dr. West's medical records (documenting Dick believed Rich was trying to "have him removed from the home"), Dick's Affidavit, prepared by Sue's attorney (stating that he "wishes to remain at home"), and Dick's out-of-character silence about the disinheritance of his children and grandchildren. *See* Appellants' Brief at 8-13, 27-35. Sue argues her statements to Dick were true based on the language of the Petition which sought to have Rich appointed as guardian. *See* Appellees' Brief at 9. However, Rich withdrew this request ***within days*** and advised the Court that he did not wish to be appointed guardian. Dick was never told the truth, and Sue perpetuated the myth that Rich wanted to "take control" and place Dick in a nursing home (VR 6/20/13: S. Raffle 11:13:30-11:14:49)

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[2] Illustrative of Sue's irrational denial that factual issues exist is page 14 of her brief which states that there is not "one scintilla of proof" that multiple takes of the will execution exist. *See* Appellees' Brief at 14. What Appellants said, and what the record shows, is that the will execution video is possibly **the third time** Sue and her lawyers had attempted to get Dick upright and marginally coherent in order to make a taped statement. *See* Appellants' Brief at 11. The September 27, 2008 Nurses' Registry note states: "...Attorney ***unable to get statement*** because Mr. Getty was too sleepy and appeared to be disoriented as a result of pain med given at 3 p.m....." (PTE 132 (emphasis added)). A nurse, Marie Cameron, testified that the "attorney" was Kevan Morgan and that Mr. Morgan may have videotaped Dick signing documents on two occasions and neither tape ever saw the light of day at trial. (VR 6/25/13; Cameron at 3:29:27-3:34:53)

In addition, Appellants set out 9 pages of evidence that supported each of the 5 applicable badges of undue influence. *See* Appellants' Brief at 27-35. Inexplicably, Sue argues that that there is a total absence of facts to support any badge of undue influence. *See* Appellees' Brief at 28.

As for the first badge, Sue argues that she put forth evidence that Dick was not impaired based on testimony that he was the "same old Dick Getty" even in his older age. *Id.* at 30. The Court must take as true the contrary evidence contained in Appellants' brief that Dick was on the highest doses of narcotic pain medication of his life and that these medications rendered him disoriented. *See* Appellants' Brief at 17-18.

As to the second badge, Sue cannot dispute that whether a will is unnatural in its disposition is a factual inquiry for the jury to consider based on the specific circumstances of this case. Given that the 2008 estate plan leaving everything to Sue was radically different from 5 prior estate plans, it was for the jury to determine whether the will was unnatural under the circumstances.[3] Indeed, Sue's brief admits that the March 2004 estate plan, executed prior to the 2008 estate plan and validated by the jury's verdict, was prepared by Whitney Wallingford at Dick's ***sole*** direction and ***without*** the participation or involvement by Rich.[4] *See* Appellees' Brief at 7. The March 2004 estate

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[3] Sue incorrectly claims that the wills executed in 1998, 2000 and 2002 "generally left a life estate" in the Regency Center income for Sue. *See* Appellees' Brief at 6. The 1998 and 2000 wills left the Regency Center to Sue, Rich and Yolanda in "equal shares" with income to provide for Sue's maintenance and the remainder to Rich and Yolanda, unless Sue should remarry in which case the Regency Center would be sold and the proceeds divided evenly among them. *See* Appellees' Appendix 5 and 6. The 2002 will left Sue a life estate in the Regency Center unless she should remarry in which case the Regency Center would be sold and the proceeds divided evenly among Sue, Rich and Yolanda. *Id.* at Appendix 6.

[4] Sue claims that the jury wished to impose their own distribution based on a question presented during deliberations. *See* Appellees' Brief at 3. Counsel for both sides approved and signed off on the Court's response to the inquiry which was: "Everything will revert to the March 22, 2004, Will and Trust." (RA 10204) The Jury sought to carry out Dick's testamentary intent as expressed in his last true estate plan from March of 2004.

plan unquestionably represents Dick's wishes and, while it provides nicely for Sue, it also provides for Dick's children and grandchildren.

As for the badge regarding participation by the principal beneficiary in the estate plan, Sue's brief states that she was not actually present in the room when the documents were signed and, as proof, notes Carroway's statement on the video that there are only 4 people in the room (Carroway, Dick and two paralegals). *Id.* at 32-33. Simply because Sue continues this dishonest refrain does not make it true. Sue's voice can be heard on the videotape, she can be seen when she hands Dick a tray, and her presence was required to execute the deeds needed to transfer the major assets. *See* Appellants' Brief at 32-33. There is no question but that Sue was physically present and participated in the execution of the estate plan.

More importantly, Appellants laid out the evidence showing that Sue was behind the revisions to the 2008 estate plan on pages 30-33 of their brief. In response, Sue argues that there is "not one scintilla of evidence" that supports the contention that Carroway was acting at the direction of Sue. *See* Appellees' Brief at 29. The law requires this Court to accept as true Carroway's legal bills which contain entries regarding her conversations with Sue and Sue's attorney, C.V. Collins, during the time when the estate plan was being prepared and the entries referring to Sue as her client in the fall of 2008. *See* Appellants' Brief at 31. The Court must also accept as true the other evidence showing Carroway was acting out of loyalty to Sue by failing to investigate the CPA's allegations of Sue's misuse of money and by drafting provisions in the estate plan that were most certainly requested by Sue (such as eliminating reference to Dick's first wife, Carol, as had been done in each of the prior estate plans). *Id.* at 30-31.

As for the badge regarding efforts to restrict contact with the testator, Sue argues that Rich and Yolanda were "disruptive, unkind and intimidating" and that "it simply makes no sense" that the nursing staff assisted Sue in her attempts to isolate Dick. *See* Appellees' Brief at 33. Sue is arguing the facts to this Court just as she argued them to the jury. It was for the jury to determine whether Sue attempted to restrict contact between Dick and his biological family as supported by the evidence detailed in Appellants' Brief on pages 33-34.

Finally, Sue does not even try to dispute the evidence of absolute control over the testator's affairs including the evidence that she was in control of housing, assets and communications, was intercepting Dick's mail, was receiving all communications from Carroway, was misrepresenting the Guardianship case, and was lying to Dick, telling him that Rich "closed down" his bank account (a total untruth) causing Sue to be unable to pay bills all the while knowing that the Court appointed CPA was managing the money. *See* Appellants' Brief at 34-35 (setting out the evidence of this badge of undue influence); Appellees' Brief at 35 (which does not dispute any of this evidence).

3. The Trial Court Properly Denied The Motion For Directed Verdict As To Sue's Misappropriation Of Funds From The 2004 Trust

Regarding the misappropriation of funds from the March 2004 Trust, Sue argues that Appellants are trying to persuade this Court to reverse the Court of Appeals and reinstate the jury's verdict under some "novel theory." The only "novel theory" is the one advocated by Sue and erroneously accepted by the Court of Appeals—that Kentucky law governing the division of martial assets in divorce proceedings applies to the facts of this case and absolves Sue from her larcenous conduct.

The underlying purposes promoted by the application of KRS Chapter 403 are identified in KRS 403.110. These purposes do not include disregarding a person's wishes as expressed in his or her estate plan. Indeed, the designation of marital/non-marital property arising out of divorce proceedings is wholly irrelevant, and there is no law supporting its application to the facts of this case.

The evidence demonstrated that Sue knowingly and voluntarily released all of her interest in the Regency Center, which Dick owned prior to their marriage. (PTE 144) Dick subsequently transferred the Regency Center, along with the income it generated, in the March 2004 Trust for his exclusive benefit during his lifetime. (PTE 109, Articles 1 & 4) The evidence at trial established that Sue, while acting as Dick's attorney-in-fact, misappropriated funds generated by the Regency Center that were held in a separate March 2004 Trust account. (Appellants' Brief at 36)

Based on this evidence, and the law governing the causes of action asserted by the Appellants (i.e., breach of fiduciary duty, fraud and deceit, conversion, etc.), the trial court rightfully denied Appellees' motion for directed verdict and allowed the matter to be decided by the jury. This Court now should reverse the Court of Appeals and reinstate the jury's verdict in favor of the Appellants.

4. <u>The Court Of Appeals Erred In Reversing The Sanction Award</u>

Appellees do not believe that the Circuit Court should have designated the February 12, 2010 Order as "final and appealable" and they persist in describing it as an "interlocutory discovery order" not subject to CR 59.05, 62.01 or KRS 426.030. *See* Appellees' Brief at 40. The February 12, 2010 Order was designated "final and

appealable" (RA 829-834) because, according to the trial judge, "in this Court's mind, it was final." (RA, 3/4/10 Hearing 12:45:00-12:59-09)

Appellees attempt to frame the issue as whether the filing of a "premature Motion for Reconsideration" results in an "automatic reinstatement of the injunction." *See* Appellees' Brief at 40. *See also id.* at 20 (framing the issue as Appellants failing to take action to stay dissolution of the injunction). This is a significant misrepresentation of the proceedings below and the issue before Judge Julia Adams. The finding of contempt rests on the representation by Sue and her attorneys to the funeral home that the February 12, 2010 Order could be acted upon to cremate the body when it was stayed by operation of law.[5] The representation to the funeral home was found to be in bad faith because: 1) the Order was stayed pursuant to CR 62.01; 2) the Order was stayed pursuant to KRS 426.030; 3) the parties knew that additional Circuit Court and appellate proceedings lie ahead to further review the matter of the autopsy; and 4) Sue and her attorneys provided no notice to the Court or the parties of their intended actions.[6]

As Judge Adams recognized, "[l]itigants cannot in good faith pick and choose which provisions they will honor and which provisions they will disregard in a given order. Should the Courts permit such conduct, they abdicate their responsibility to

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[5] Judge Adams finds in her Sanction Order that the funeral home director, Clay Forsythe, "acknowledged that he would not have made arrangements for the cremation without having received a Court order that he believed to be valid." Judge Adams further finds "Mr. Forsythe's action to complete the cremation was initiated by Attorney Carroway when she provided him with a copy of the Court's Order, stated in the telephone that Ms. Getty had received a favorable ruling and thus inferred that cremation was authorized by the Court, and then was confirmed by Ms. Getty's telephonic directive to cremate the body." RA 2497-2512 (Appellants' Appendix No. 4 at p. 9)

[6] As referenced by Sue Getty, Judge Robert McGinnis' comment that Carroway had a "legitimate reason" to read the rules the way she did was made without the benefit of the evidentiary hearing conducted by Judge Adams. *See* Appellees' Brief at 38. Judge McGinnis was not appointed to preside over the case until 2013, more than 3 years after the conduct at issue in the Sanction Order, and he did not reverse any of Judge Adams' findings or conclusions.

achieve the orderly disposition of cases." RA 2497-2512 (Appellants' Appendix 4 at p. 13). This Court should reverse the Court of Appeals' Opinion and remand the case with instructions for the trial court to enter damages for attorneys' fees and costs.

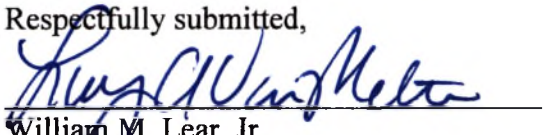
5. The Court Should Reverse The Trial Court's Denial Of A Supplemental Judgment And Bill Of Costs

Appellees do not address or dispute the arguments regarding the trial court's denial of a supplemental judgment or the Bill of Costs. Accordingly, if the Opinion of the Court of Appeals is reversed, the Court should: 1) remand the case with instructions to award equitable relief to Appellants for damages accruing between September 30, 2013 and entry of the Final Order and Judgment and 2) remand the case with instructions for the clerk to impose costs in favor of Appellants in the amount of $44,819.55.

CONCLUSION

For the reasons set out herein, in Appellants' initial brief and otherwise in the record, Appellants respectfully request that the Court reverse the Opinion of the Court of Appeals and reinstate the jury verdict and Judgment of the trial court on the issues of unsound mind and undue influence, reverse the Opinion of the Court of Appeals and reinstate the Sanction Order with instructions to enter damages for attorneys' fees and costs, remand the case with instructions to award equitable relief to Appellants for damages accruing between September 30, 2013 and entry of the Final Order and Judgment, and remand the case with instructions for the Clerk to impose costs in favor of Appellants in the amount of $44,819.55.

Respectfully submitted,



William M. Lear, Jr.
John W. Bilby
Lucy A. VanMeter